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August 2, 1999

WRITER'S DIRECT DIAL NO.

BY HAND DELIVERY

Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
The Portals, 445 Twelfth Street, S.W.
Room TW-A325
Washington, DC 20554

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AUG 2 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY


**Re: Initial Regulatory Flexibility Analysis
Private Radio Auction Proposal
WT Docket No. 99-87 and RM-9332**

Dear Ms. Salas:

Enclosed you will find an original and six copies of comments which are responsive to the Initial Regulatory Flexibility Analysis prepared by the Commission in the above-referenced rule making proceeding.

If you have any questions regarding this matter, please do not hesitate to contact this office.

Respectfully submitted,


John A. Prendergast
Laura A. Otis

Enclosure

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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AUG 2 1999

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)	
)	
Implementation of Sections 309(j) and)	WT Docket No. 99-87
337 of the Communications Act of 1934)	
as Amended)	
)	
Promotion of Spectrum Efficient)	RM-9332
Technologies on Certain Part 90)	
Frequencies)	
)	
Establishment of Public Service Radio)	
Pool in the Private Mobile)	
Frequencies Below 800 MHz)	

TO: The Commission

**INITIAL REGULATORY FLEXIBILITY ANALYSIS
COMMENTS**

The law firm of Blooston, Mordkofsky, Jackson & Dickens, on behalf of its private internal radio clients listed in Attachment A hereto, hereby submits the following comments responsive to the Initial Regulatory Flexibility Analysis ("IRFA") prepared by the Commission in the above-captioned rule making proceeding. As demonstrated below, the Commission's proposal to adopt geographic licensing and competitive bidding for private internal radio services will adversely affect small businesses, particularly those operating in rural areas. Considering this negative impact, and the fact that a large percentage of private radio users are small entities, the Commission should abandon the proposal pursuant to its statutory obligations to protect small businesses.

Background

In the Notice of Proposed Rulemaking (“NPRM”), released in the above-captioned proceeding on March 25, 1999, the Commission requested comment on the issue of whether geographic licensing and competitive bidding, pursuant to Section 309(j) of the Communications Act of 1934 (“Communications Act”),¹ should extend to private internal radio services, and whether there are means by which the Commission can design a competitive bidding system to ensure that the four public interest objectives listed in Section 309(j)(3)(A)-(D) are satisfied. In an appendix to the NPRM, the Commission set forth its IRFA, and requested comment specifically addressing the question of whether small entities will be affected by its proposal to implement competitive bidding for private internal radio services. Blooston, Mordkofsky, Jackson & Dickens, in separately filed comments, on behalf of its clients has vigorously opposed this proposal, stressing the Commission’s lack of authority to license the private radio frequencies through auctions, the inherent difficulties associated with auctioning licenses in shared spectrum, and the adverse impact on the public interest. In response to the Commission’s IRFA, the private internal radio licensees listed in Attachment A offer the following comments.

The Commission’s Proposed Auction Program Contravenes Policies Protecting Small Businesses

As the Commission and Congress are well aware, small businesses make indispensable contributions to the United States economy. For example, in 1996, small business-dominated industries generated an estimated 64 percent of the 2.5 million new jobs created, provided about 67 percent of initial job opportunities, and produced about

51 percent of the private gross domestic product.² Studies show that smaller companies play a particularly important role in developing innovative products and processes and bringing them to the marketplace. One recent study undertaken by the National Science Foundation identified a total of 8,074 innovations in 362 industries, and estimated that small firms were responsible for 55 percent of these innovations.³ Recognizing these contributions, Congress has passed numerous measures designed to protect small business from unnecessary and burdensome regulation. As discussed below, an auction licensing scheme for private internal radio services would impose an undue burden on small businesses, leading to declines in their growth, productivity and innovation, and frustrating the goals underlying these measures.

The first measure is the Paperwork Reduction Act of 1980, as amended in 1995,⁴ which directs federal agencies to “minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons.”⁵ The proposed licensing scheme may directly violate the provisions of the Paperwork Reduction Act, since the auction application process can be viewed as an “information collection” measure in which applicants must provide detailed ownership and financial information. Moreover, the adverse impact on small businesses by this proposal

¹ 47 U.S.C. § 309(j) (as amended by Balanced Budget Act of 1997, § 3002).

² U.S. Small Business Administration, Office of the Advocacy, Office of Economic Research, The Facts About Small Business, 1-2 (revised September 1997) (based on data produced by the U.S. Department of Labor, U.S. Department of Commerce).

³ U.S. Small Business Administration, Office of the Advocacy, The State of Small Business, 140 (Washington, D.C.: U.S. Government Printing Office, 1996).

⁴ P.L. 96-511, 44 U.S.C. §§ 3501-3520.

⁵ 44 U.S.C. § 3501(a).

contravenes the policy underlying the Paperwork Reduction Act. In order to obtain a license through competitive bidding, small businesses will be forced to devote their limited time, man-power and financial resources to prepare lengthy applications, and review and analyze complex bidding data, including maps, band plans, reports, charts, studies, and other auction-related information. The voluminous amount of auction data provided by the Commission to inform prospective bidders of available geographic licenses will unnecessarily confuse and overwhelm the owner of a small entity, who generally needs only a limited amount of spectrum for private internal radio operations at a specific location. If the Commission introduces its proposed auction scheme, small businesses will be forced to go beyond their budgetary constraints and consult with attorneys, engineers, and other professionals at every turn. In addition, they may be forced to hire additional personnel to handle day-to-day operations while the auctions take place, since many small entities do not have the man-power to maintain a viable business while devoting the time necessary to participate in an auction. For a small business, the Commission's proposed auction will be far more costly, complicated, and time-consuming than the current site-based licensing method used by the Commission to allocate private radio frequencies.

Moreover, small businesses will likely have to file detailed disclosures about their revenues, assets and financial information, in order to obtain designated entity bidding credits. These disclosures can cause harm by giving the applicants' larger competitors an unfair insight into their ability to compete. More importantly, many small businesses simply will not be able to obtain spectrum if the Commission sells licenses for Basic Trading Areas ("BTAs"), Economic Areas ("EAs") or other license designations used in

prior auctions. These entities will not be able to afford the bid amount, especially when combined with whatever buildout requirements the Commission imposes. Despite the benefits to small businesses provided by private internal radio services, the administrative/financial burdens associated with competitive bidding will discourage, if not entirely preclude, most small businesses from seeking private radio spectrum.

The Commission's proposed auction scheme also directly conflicts with the goals underlying the Regulatory Flexibility Act ("RFA").⁶ Congress adopted this law with the intent of protecting small businesses from federal regulations which limit their ability to compete in the marketplace, and which discourage potential entrepreneurs from introducing beneficial products and processes. Congress found that the public interest would ultimately be harmed by any federal regulations which adversely affect small businesses, observing as follows: "[t]he public interest lies directly in two areas: (1) the disproportionate impact of Government regulation on small businesses reduces the competitive capacity of small business, thereby placing Government in the strange position of encouraging economic concentration, and (2) consumers, to a large extent, must pay the cost of regulation in the form of higher prices. Thus, while the immediate and visible impact may fall to the small entrepreneur, the public shares the burden."⁷ Because small businesses lack the resources to participate in auctions and build out wide-area systems, they will have little choice but to leave the private radio spectrum to large

⁶ P.L. No. 96-354, 194 Stat. 1164 (1980), 5 U.S.C. §§ 601-612. 5 U.S.C. Sec. 601, et. seq. has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996). Title II of the CWAAA is the Small Business Regulatory Enforcement Act of 1996.

⁷ 126 Cong. Rec. 24,575, 24,588.

companies which already enjoy significant advantages over small businesses. This concentration of private radio licenses, which will ultimately hurt the public by reducing the competitive capacity of small businesses and discouraging innovation, is precisely what Congress had hoped to prevent when adopting the RFA. Indeed, the Commission's "band manager" and "combinatorial bidding" proposals would lead even more directly to such concentration.

Conclusion

At present, there are over 1,000,000 licensed private radio stations authorized to operate more than 12 million transmitters.⁸ A significant portion of these stations are operated by small businesses which have been able to acquire private radio licenses because they face no serious obstacles under the Commission's current licensing scheme. As discussed above, the Commission proposed auction program imposes numerous administrative and financial burdens which may not affect large businesses enjoying the advantage of economies of scale. This disparate treatment of applicants will distort competition for spectrum, and will dramatically change the composition of the private radio industry. Small businesses will find it difficult, if not impossible, to obtain private radio frequencies, leading to the concentration of licenses in the hands of large companies. Moreover, these auction winners will have little economic incentive to provide the customized private radio services which small entities need.⁹ Small entities

⁸ Wireless Telecommunications Bureau, Private Land Mobile Radio Services: Background, Introduction (December 18, 1996) ("White Paper").

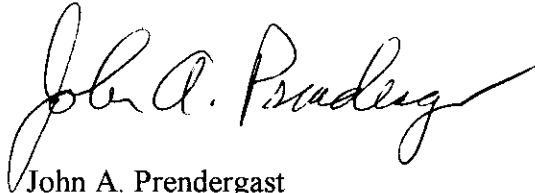
⁹ The Wireless Telecommunications Bureau has accurately observed that "[p]rivate radio systems serve a great variety of communication needs that common carriers and other commercial service providers historically have not been able or willing to fulfill." Id. at 7.

will therefore be forced to compete in the marketplace without the benefit of private internal radio services.¹⁰ The Commission's auction proposal will not only lead to the inefficient use of spectrum, but will stunt the growth and innovation of small businesses which currently rely on the use of private radio frequencies. Since an auction scheme for private internal radio services would contravene policies protecting small businesses, and considering the fact that the Commission is obligated under Section 309(j)(3) of the Communications Act to promote innovation, competition, and the dissemination of licenses among a wide variety of applicants, including small businesses, the Commission should preserve its existing private radio licensing program which places small and large businesses on equal footing and serves the public interest.

¹⁰ The Wireless Telecommunications Bureau has acknowledged the value of private internal radio systems, noting that private radio applications "give companies a direct and immediate control over their operations; a critical factor in maintaining efficient performance, preventing accidents, and responding to emergencies." *Id.* at 8.

Wherefore, the premises considered, it is respectfully submitted that the Commission should revise its IRFA in accordance with the comments and conclusions expressed herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John A. Prendergast", with a long, sweeping horizontal stroke extending to the right.

John A. Prendergast

Laura A. Otis

**Blooston, Mordkofsky, Jackson
& Dickens**

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Washington, D.C. 20037

(202) 828-0830

August 2, 1999

Attachment A

The Private Internal Radio Licensees:

Betterroads Asphalt Corporation
Clarkson Construction Company, Inc.
Cross Timbers Oil Company
Flash Cab Company
Foster Engineering Company
Hill County Electric Cooperative, Inc.
Hutchinson Telephone Company, Inc.
Lubbock Radio Paging Service, Inc.
Mankato Citizens Telephone Company
Midwest Mobile Radio Service
Mobilephone of Humboldt, Inc.
Mobile Phone of Texas, Inc.
Nemont Telephone Cooperative
North Pittsburgh Telephone Company
Pond Branch Telephone Company, Inc.
Supreme Security Systems
TXU Communications Telephone Company
Webster Calhoun Cooperative Telephone Association
The Wilkinsburg-Penn Joint Water Authority
XIT Rural Telephone Cooperative, Inc.
Zirkelbach Refrigeration, Inc.

CERTIFICATE OF SERVICE

I, Laura A. Otis, an attorney at the law office of Blooston, Mordkofsky, Jackson & Dickens, hereby certify that on this 2nd day of August, 1999, I caused to be hand-delivered a copy of the foregoing Comments to the following:

Chairman William E. Kennard
Federal Communications Commission
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Washington DC 20554

Commissioner Susan Ness
Federal Communications Commission
445 12th St. S.W. Room 8-B115
Washington DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
445 12th St. S.W. Room 8-C302
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Commissioner Harold Furchgott-Roth
Federal Communications Commission
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Laura A. Otis